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REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Minimum humanitarian standards

Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21

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Introduction

1. In its resolution 1997/21 entitled "Minimum humanitarian standards", the Commission on Human Rights requested the Secretary-General to prepare "an analytical report on the issue of fundamental standards of humanity" for submission at its fifty-fourth session, taking into consideration in particular the issues raised in the report of the International Workshop on Minimum Humanitarian Standards held in Cape Town, South Africa in September 1996 and identifying, inter alia, common rules of human rights and humanitarian law that are applicable in all circumstances.

2. The issues raised by resolution 1997/21 are complex, involving difficult questions of both law and policy. They deserve careful study and meaningful input from different actors. The purpose of the present report, therefore, is not to reach firm conclusions but rather to set the framework for future discussions on the issue of fundamental standards of humanity. This will be done by describing the various problems and issues raised. Some tentative suggestions are provided as to possible further action, including identifying issues needing further study.

3. The Commission in resolution 1997/21 also requested the Secretary-General to seek the views of and information from Governments, United Nations bodies, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR), the human rights treaty bodies and intergovernmental organizations, as well as regional organizations and non-governmental organizations. As in previous years, a number of responses were received; the responses received up to the end of 1997 will be set out in an additional report. To date, most of the responses received from Governments and intergovernmental organizations have indicated their support, in general terms, for the development of "minimum humanitarian standards" or fundamental standards of humanity, although they have often recommended further consideration of certain issues. The responses received to date have been carefully reviewed and many of the points raised in them are reflected in this report.

4. The Secretary-General was requested to prepare his report in coordination with the International Committee of the Red Cross (ICRC), and their comments and advice are gratefully acknowledged.

I. TERMINOLOGY

5. At the outset, it will assist the discussion if a few points are made regarding the use of particular terms and phrases. The issue under discussion had been given the designation "minimum humanitarian standards", following from a declaration with that title which was submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1991 (see E/CN.4/Sub.2/1991/55) and led to the present discussion. However, the latest Commission resolution refers explicitly to "fundamental standards of humanity", and this term is to be preferred for a number of reasons. First, the use of the qualifying word "minimum" has been criticized (including at the workshop in Cape Town), and second because the phrase "humanitarian standards" might give the impression that the exercise is solely concerned with international humanitarian law (the law regulating armed conflicts), whereas

in fact that branch of international law is only one part of the discussion. As originally used, the phrase "humanitarian standards" was intended to include standards of both international human rights and humanitarian law, but it would seem that "standards of humanity" better serves this purpose. Also, in recent years there has been a good deal of discussion concerning humanitarian assistance, including criteria to guide the provision and delivery of such assistance. While this is a related point, it is not the main focus of the present discussion and, to avoid confusion, the term "standards of humanity" is therefore preferable.

6. A second issue of terminology concerns the manner in which to describe fighting and violence inside countries. Only "armed conflicts", whether of an international or non-international character, are regulated by international humanitarian law. This law provides some criteria for determining whether violence inside a country amounts to an internal armed conflict so as to come within the scope of the relevant rules. However, there is often disagreement about the application of these criteria, and this can lead to misunderstandings about the use of terms such as "internal armed conflict" or even "internal conflict". To avoid such misunderstandings, this report will generally use the term "internal violence" to describe situations where fighting and conflict, of whatever intensity, is taking place inside countries, and without prejudice to any legal characterization of the fighting for the purposes of applying international humanitarian law.

7. A third issue of terminology concerns the description of groups who have taken up arms against the Government. A number of appellations can be used: terrorist groups, guerrillas, resistance movements, etc., each of the terms carrying different connotations. In this report, the terms "armed group" or "non-State armed group" will be used to describe those who take up arms in a challenge to government authority, leaving aside the question of whether their activities and aims qualify them as "terrorists" or "freedom fighters". 1/ The choice of the more neutral term - armed group - is in no way meant to imply any legitimacy for the group or its cause; such groups can, and frequently do, engage in acts of terrorism.

II. BACKGROUND

A. Brief history of the discussion

8. The need for identifying fundamental standards of humanity arises from the observation that, at the present time, it is often situations of internal violence that pose the greatest threat to human dignity and freedom. The truth of this observation is borne out in many countries around the world. The reports prepared by or for United Nations human rights bodies repeatedly draw attention to the link between human rights abuses and ongoing violence and confrontation between armed groups and government forces, or simply between different armed groups. Although such situations frequently lead to the most gross human rights abuses, there are disagreements and doubts regarding the applicable norms of both human rights and humanitarian law. The rules of international humanitarian law are different depending on the nature and intensity of the conflict. There are disagreements concerning the point at which internal violence reaches a level where the humanitarian law rules regulating internal armed conflicts become operable. Even when these rules

manifestly do apply, it is generally acknowledged that, in contrast to the rules applying in international armed conflicts, they provide only the bare minimum of protection.

9. Further, until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situations of internal violence it is also important to address the behaviour of non-State armed groups. It is also argued that some human rights norms lack the specificity required to be effective in situations of violent conflict. Finally, concern has been expressed about the possibilities for Governments to derogate from certain obligations under human rights law in these situations.

10. The discrepancy between the scale of the abuses perpetrated in situations of internal violence, and the apparent lack of clear rules, has been the inspiration for efforts to draw up "minimum humanitarian standards" or fundamental standards of humanity. The most notable effort in this regard has been the elaboration, by a group of non-governmental experts, of the Declaration on Minimum Humanitarian Standards in Turku/Åbo, Finland, in 1990 (at a meeting convened by the Institute for Human Rights at Åbo Akademi University). The preamble to this declaration recalls that

> "... international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency." 2/

11. This document was considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-third session in 1991. At its forty-sixth session in 1994 the Sub-Commission decided to transmit the document to the Commission on Human Rights "with a view to its further elaboration and eventual adoption" (resolution 1994/26). In 1995 the Commission on Human Rights, in resolution 1995/29, taking note of the Sub-Commission's resolution, recognized the need to address principles applicable to situations of internal and related violence, disturbance, tension and public emergency in a manner consistent with international law and the Charter of the United Nations and requested that the Declaration on Minimum Humanitarian Standards be sent to Governments and intergovernmental and non-governmental organizations for their comments.

12. In considering the issue at its forty-second session in 1996, the Commission on Human Rights did not make a specific reference to any particular document, but again recognized the need to address principles applicable to situations of internal violence. It also welcomed the offer by the Nordic countries, in cooperation with the ICRC, to organize a workshop to consider the issue (resolution 1996/26). As noted, this workshop was held in Cape Town, South Africa, in September 1996, and a report of the workshop (E/CN.4/1997/77/Add.1) was made available to the Commission on Human Rights at its last session.

13. The main issue for consideration therefore is the necessity and desirability of identifying principles or standards for the better protection of the human person in situations of internal violence. Bearing in mind the

terrible toll of atrocities and suffering associated with such situations in recent years, the opportunity to address this topic is both welcome and timely.

B. A reminder

14. Before proceeding, it is worth recalling that in many situations war itself, or the recourse to violence, is a negation of human rights. As stated in the preamble to the United Nations Declaration on the Right of Peoples to Peace (General Assembly resolution 39/11 of 12 November 1984, annex)

> "[The General Assembly,]
>
> "Convinced that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations ..."

15. Measures aimed at reducing human rights abuses in situations of internal violence must not detract from efforts to prevent or end such violence. Neither must they lend weight to the argument of despair that such efforts are doomed to failure. The importance of addressing the root causes of violence and conflict must always be at the centre of United Nations efforts; in this regard, special emphasis needs to be placed on ensuring the protection of minorities, of strengthening democracy and democratic institutions, of overcoming obstacles to the realization of the right to development, and of securing respect for human rights generally.

16. This report is firmly grounded in the understanding that human rights are interdependent and interrelated. Efforts to minimize human rights abuses in situations of internal violence depend on achieving a greater awareness of and respect for all human rights. Preventing the use of starvation of civilians as a method of warfare will be easier if there is an acceptance of the right to food, and an understanding of the obligations associated with that right. At the same time, while there are no "clean" wars, recent history shows us that conflicts fought with a minimum of violence, and with greater attention to fundamental standards of humanity, lend themselves more readily to a peaceful solution and provide the conditions in which reconciliation and justice can prevail.

III. HUMAN RIGHTS ABUSES IN SITUATIONS OF INTERNAL VIOLENCE

A. Common characteristics

17. At the outset, it seems necessary to make some comments concerning the characteristics of situations of internal violence in the post-cold war world. In recent years, several reports issued to or by United Nations bodies and specialized agencies have considered the problems posed by such situations. 3/ For the purposes of this report, a number of relevant observations emerge.

18. The decrease in the number of international armed conflicts has been offset by an increase in the number of civil wars and other situations of violence inside countries. Quantifying the scale of the problem is difficult

as there is no firm agreement on the factors to apply in deciding which are the most serious situations. If the factor of number of deaths is used, then, according to some researchers, in 1996 there were 19 situations of internal violence in which at least 1,000 people were killed ("high intensity conflicts") and which, cumulatively (since their beginning, in some cases many years ago), had led to between 6.5 and 8.4 million deaths. If one includes situations of internal violence which, in 1996, had de-escalated or ended, another 2 million deaths could be added. In addition, in 1996 there were approximately 40 other internal situations causing between 100 and 1,000 deaths ("low intensity conflicts"), which cumulatively have also led to thousands of deaths. 4/ Of course, the number of conflict-related deaths is but a small part of the suffering and devastation found in such situations. Whatever the number, there is no doubting the scale of the problem.

19. These situations are characterized by the existence of an armed challenge to the Government, in the form of one or more groups taking up arms in pursuit of, broadly speaking, political objectives. 5/ These objectives might include demands for more autonomy or even secession for particular ethnic, religious or linguistic minorities within the State concerned, overthrowing the existing Government, rejection of the existing constitutional order, or challenges to the territorial integrity of the State. In other situations, where an existing Government collapses or is unable or unwilling to intervene, armed groups fight among themselves; for example, for the right to establish a new Government or to ensure the supremacy or continuation of their own particular political programme.

20. The degree of organization of these armed groups, their size, sophistication, and the extent to which they exercise actual control over territory and population vary from one situation to the next. At one extreme, such groups might resemble de facto Governments, with control over territory and population and establishing and/or maintaining public services such as schools, hospitals, forces of law and order, etc. At the other extreme, some armed groups will operate only sporadically, or in an entirely clandestine manner, and exercise no direct control over territory. Some armed groups operate under clear lines of command and control; others are loosely organized and various units might not be under effective central command.

21. In many situations of internal violence there will be a breakdown in the operation of public institutions. Schools will be closed, local government unable to function, and police and judicial institutions may suffer. Such breakdowns might be limited to particular areas of the country, or apply more generally. The functions of government often become increasingly militarized, with the armed forces assuming civilian police functions and military courts trying civilians; often the military's power is beyond the reach of civilian control. Depending on the degree and scope of the violence, there is also likely to be an impact on the livelihood of the civilian population. This impact often is felt most in rural areas (where the fighting usually takes place); farmers and others dependent on the land are particularly vulnerable.

22. There is no doubt that the ready availability of weapons is a predominant characteristic of these situations. Both government forces and armed groups appear to be well supplied with light weaponry. While the devastating impact of anti-personnel landmines has received a good deal of

publicity and significant steps are now being taken to ban this weapon, a majority of civilian casualties result from the use of other weapons 6/ - such as assault rifles, light artillery (e.g., mortars), and fragmentation bombs or grenades - the indiscriminate use of which attracts little international condemnation.

23. A final common element in these situations is the link between criminal and "political" violence. While some armed groups might limit themselves to military activities, others, though allegedly contesting political power, are more reminiscent of criminal gangs, engaging in theft, extortion and banditry on a mass scale. Government forces too engage in such activities, the collapse in civil institutions creating a climate of general lawlessness in which preying on the civilian population is common and corruption rampant. Banditry and extortion are used to fund and supply the continuation of the fighting.

B. Patterns of abuse

24. In her report Ms. Machel drew attention to the "shocking" statistic of over 2 million children killed in conflicts in the last decade, the vast majority of them in situations of internal violence and conflict. The conclusion to be drawn, according to the report, is that

> "... more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink" (A/51/306, para. 3).

25. While children are the most vulnerable, other groups too are at risk of experiencing this "unregulated terror and violence". These include women, minority ethnic populations, refugees and the displaced, and those detained in connection with the violence; indeed, the civilian population generally is at risk.

26. While the statistic of 2 million dead children speaks volumes about the scale of the abuse, some further comments should be made about the nature and type of the most common human rights abuses in these situations. A comprehensive survey is beyond the scope of the present report. But again, some general observations may be made.

27. The most serious abuses involve arbitrary deprivation of the right to life. Civilians are directly or indiscriminately attacked and killed by armed forces and armed groups. Massacres of civilians are common. Often civilian deaths are the result of the indiscriminate use of weapons. Captured combatants are summarily executed, as are non-combatants whose religious or ethnic identity, or political opinion, make them suspect in the eyes of their captors. Others die from starvation or disease, when relief supplies are arbitrarily withheld from them. Those exercising their right to peaceful protest are killed when police or security forces respond with excessive force.

28. The practice of torture, or cruel, inhuman or degrading treatment or punishment, is frequently related to internal violence. Those detained in connection with the violence are tortured to extract confessions, to obtain information about opposition groups, or to brutalize or intimidate them. Captured combatants, members of political organizations who speak out, villagers and peasants in areas where fighting is taking place and suspected sympathizers of the opposing party are all at risk of being tortured. New recruits into armed forces and armed groups are beaten and ill-treated to force them into obedience. Villagers are forced to act as labourers for armed forces and armed groups, often under appalling conditions.

29. Conflicts tend to lead to displacement as people flee affected areas but deliberate interference with freedom of movement is also common. People are rounded up and moved out of their home areas against their will, and without any justification. This is done to create "security" zones, to deprive armed groups of indirect civilian support or as a means of punishing or terrorizing minority ethnic, linguistic or religious populations viewed as hostile, or to expel such populations from particular territories. Those who flee or who are expelled are denied access to safety - in their own or other countries - or are forced back to unsafe areas. When it is safe to return, they are often prevented from doing so and condemned to a life in exile. Also, the displaced are often restricted to camps, in circumstances akin to internment or detention.

30. Children's vulnerability means they are at particular risk of suffering abuses and the attack on children's human rights in internal conflicts was also highlighted by Ms. Machel. The impact of the violence on rights associated with their education, health, and general well-being and development can be enormous. If orphaned or separated (often forcibly) from their families as a result of the fighting, these problems are exacerbated. In addition, children are recruited into the armed forces and are sent into combat, are used as a ready supply of forced labour for armed forces, and are subject to sexual abuse.

31. War is for the most part waged by men - this fact has enormous implications for the protection of women's human rights in situations of internal violence. Women and girls are raped by soldiers and members of armed groups and are abducted into forced prostitution. A majority of civilians caught up in the fighting are often women and children, including those displaced, and they therefore suffer a disproportionate share of the abuses directed at the civilian population. 7/

32. Rights associated with arbitrary deprivation of liberty and due process are also commonly abused. Hundreds or even thousands of people might be detained in connection with the fighting; in many cases suspected members of armed groups or their supporters are detained for months and years without being charged or tried. If trials do take place, fundamental fair trial guarantees are often ignored; military courts are used to try and sentence civilians. Armed groups take people hostage, and hold "trials" of suspected political opponents or "traitors". Both government forces and armed groups take people into custody but deny they are holding them - tens of thousands of people have disappeared or gone missing in this way in recent years. Usually, they have been killed and their bodies secretly disposed of.

33. Finally, there is a widespread disregard for the protections owed to civilians. Civilian property - homes, belongings, crops, livestock - is wantonly destroyed or pillaged. Hospitals and schools are deliberately destroyed, as are religious and cultural buildings. Civilians are denied access to relief supplies, such as food and medicine, or the distribution of such supplies is subject to unwarranted interference. The protections owed to medical and religious personnel are ignored. Recognized humanitarian agencies are prevented from operating, their staff are threatened and attacked and their equipment is stolen or destroyed.

34. A recurring theme that applies to all of these human rights abuses is that, in the overwhelming majority of cases, the victims, or their families, find no justice. Those who kill, torture, rape, or attack them do so with virtual impunity, apparently confident that they will never be called to account for their misdeeds.

35. Also common to all these abuses is the difficulty, in some situations, of attributing responsibility for the violence. The existence of a situation of internal violence usually means that at least two - and often more - opposing forces or groups have resorted to the use of force; the hostility and distrust between them gives ample scope for the dissemination of misinformation and propaganda. Allegations that one side might commit abuses in such a manner as to make the other side appear responsible cannot always be dismissed. When abuses take place in remote areas, identifying the perpetrators can be very difficult. These difficulties are further increased when the authorities place restrictions on the free flow of information and the operation of news media, including denying journalists access to conflict zones. Journalists are also threatened and killed - another means of preventing disclosure of information on abuses. United Nations investigators and human rights monitors are also denied access to places where abuses are alleged to have taken place.

36. It should be emphasized that the above is just a general overview of the human rights abuses common in situations of internal violence, and of some of the most relevant characteristics of these situations. It is by no means an exhaustive survey. It is interesting to note that a good deal of information, including from United Nations sources, is available regarding these issues - for example, in the reports of country and thematic rapporteurs and working groups of the Comission on Human Rights.

37. It might be useful, within the framework of further study, to collect information from existing sources on types of human rights abuse in situations of internal violence - including abuses committed by armed groups. The purpose would be to expand considerably on the typology set out above, and therefore gain a fuller picture of the human rights abuses that we are aiming to prevent, and the context in which they take place.

IV. OUTLINE OF THE ISSUES INVOLVED

38. Throughout the consideration by the United Nations of the issues of human rights bodies addressing principles applicable to situations of internal violence, a number of questions have repeatedly emerged. This section aims to

organize and set out very briefly these questions, and the issues they raise. The following sections (V-IX) will then address the questions in more detail.

What are the problems regarding the scope of existing standards?

39. As indicated briefly above, the initiative to identify fundamental standards of humanity is based on the argument that existing standards, of both human rights and humanitarian law, do not adequately address situations of internal violence. The issue for consideration therefore is the extent to which this is the case, and to identify with some precision the problems concerning existing norms.

40. As regards human rights law, the main issues concern the posibilities for States to derogate from some of their commitments during situations of internal violence, and the extent to which, if at all, armed groups can be held accountable under international human rights law. It is further argued that some human rights guarantees lack the specificity required to be applied effectively in situations where fighting is taking place.

41. As regards international humanitarian law, the main issue concerns the difficulties in determining in which situations the rules regulating non-international armed conflicts become operable, and the fact that some situations of internal violence fall outside of existing treaty law. In addition, there is the question of the adequacy of the existing rules even in cases where the situation meets the thresholds set out in international humanitarian law. Further, there is also the need to identify customary rules of international humanitarian law.

What would be the advantages of identifying "fundamental standards of humanity", and are there significant disadvantages?

42. Obviously, if there are significant problems regarding the scope of existing standards, then in principle finding a means to extend their scope is desirable. But, the question must involve an assessment of how, in concrete terms, a more precise statement about norms of conduct would contribute to alleviating the plight of those affected by such situations.

43. Regarding the possible disadvantages, the key question is the relationship of a statement of fundamental standards of humanity to existing international law. Would such a statement undermine or in any way detract from existing standards?

What are the "fundamental standards of humanity"?

44. Resolution 1997/21 specifically indicates that the report should, inter alia, identify "common rules of human rights law and international humanitarian law that are applicable in all circumstances". The inference must be that these rules, once identified, would form the basis of a list of fundamental standards of humanity.

What would be the nature of a statement of fundamental standards of humanity?

45. Finally, assuming the desirability of identifying and setting out fundamental standards of humanity, the question arises of the means by which this should be done.

V. INTERNATIONAL HUMAN RIGHTS LAW AND SITUATIONS OF INTERNAL VIOLENCE

46. There exists an impressive body of international law concerning the protection of human rights and fundamental freedoms. Since the advent of the United Nations, covenants, conventions and declarations, as well as resolutions adopted by competent United Nations organs, have elaborated in considerable detail the scope of human rights protection. While further standard-setting in the field of human rights protection continues, and will remain necessary to keep pace with a changing world, the breadth of the existing regulation is impressive.

47. Complementing the Universal Declaration of Human Rights, there are the two International Covenants, adopted in 1966, on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). In addition, there are the Convention and Protocol relating to the Status of Refugees (1951 and 1967 respectively), the many conventions with human rights provisions adopted under the auspices of the International Labour Organization and several non-treaty declarations and other resolutions adopted by the General Assembly. Among the latter are the Declaration on the Right to Development (1986), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) and the Declaration on the Protection of All Persons from Enforced Disappearance (1992). These are just some of the many human rights standards developed by the United Nations and do not include any of the standards adopted at a regional level.

48. Given the scope of existing standards, the argument that there is a gap in the protection provided by international human rights law needs to be carefully examined. After all, the main human rights instruments (the Universal Declaration of Human Rights and the two International Covenants) taken together guarantee protection, at least in a general form, for the most important human rights and fundamental freedoms. This includes those rights of most immediate relevance to individuals in situations of internal violence. The two International Covenants have been ratified by a solid majority of Member States, 8/ and there is no doubt that some of their provisions have become norms of customary international law binding on all States. It is widely accepted that the Universal Declaration of Human Rights, though it is not a treaty per se, creates obligations on all States Members of the United Nations. Most importantly, as the Universal Declaration states, human rights are "inalienable", individuals are "born free and equal in dignity and

rights" - it follows that we possess these rights regardless of whether the countries we live in are at war or at peace.

49. However, the argument about the inadequacies of human rights law is more complex. It rests essentially on three points: the possibility of derogation, the position of non-State armed groups vis-à-vis human rights obligations, and the lack of specificity of existing standards.

A. Derogation

50. Some human rights treaties allow States, in exceptional circumstances, to take measures derogating from their obligations with regard to certain human rights commitments they have undertaken. It is widely understood that a situation of internal violence might be of such an exceptional nature as to justify derogation. The International Covenant on Civil and Political Rights (ICCPR) provides, in article 4 (1), that

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

51. A similar provision can be found in two regional human rights treaties, the American Convention on Human Rights (article 27) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 15).

52. However, article 4 (2) of the ICCPR provides that States may not derogate from their obligations regarding several of the rights protected in the Covenant, including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the right not to be imprisoned for failure to perform a contractual obligation, the right not to be subject to retroactive penal measures, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. Similar so-called non-derogable rights can be found in the two regional conventions mentioned above. 9/

53. Significantly, among others, rights related to freedom of movement, equality, protection of minorities, fair trial, freedom of expression and protection from arbitrary detention or imprisonment are rights subject to derogation under these treaties. This means that, if a situation of internal violence justifies invoking the derogation clauses, there is the possibility that States may legitimately restrict the exercise of such rights.

54. On the other hand, the possibility that a situation of fighting inside a country might allow for the legitimate restriction of certain rights does not necessarily support the conclusion that there is a gap in the protection offered by international law. First, it must be emphasized that rights which

are subject to derogation are not automatically thereby subject to outright suspension at the State's discretion. Article 4 of the ICCPR includes a number of qualifications which place concrete limits on a State's use of the derogation clauses. These include the requirements that no measures taken involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; and that each of the specific measures taken to restrict particular rights are only "to the extent strictly required by the exigencies of the situation". The latter stipulation is particularly important as it requires that the restriction must be proportional. A state of emergency might justify some restrictions on freedom of assembly and movement (for example, a night-time curfew), but not necessarily any restriction. Restrictions which are sweeping or general in nature will be inherently suspect. There are other requirements, such as the temporary nature of derogation, and its basis in law, which also limit a State's discretion.

55. Second, derogations must not be inconsistent with a State's other obligations under international law. Some human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women contain no derogation clauses, and many States that have ratified the ICCPR are also parties to these treaties.

56. Third, only the most serious internal situations justify invoking the derogation clauses. The mere existence of violence inside a country does not ipso facto justify derogation. The phrase "threatens the life of the nation" in article 4 clearly envisages a truly exceptional situation. 10/

57. Taken together, these constraints on the application of derogation clauses appear to provide a solid basis in international law for ensuring these clauses are not abused. In this regard it is interesting to note the conclusions of expert meetings which have developed in some detail guidelines for applying derogation clauses in such a manner as to ensure the greatest possible protection for human rights consistent with a State's legitimate need to respond to an exceptional situation. 11/ The use of such guidelines, firmly based in the treaty law, seems a promising means of overcoming some of the problems posed by derogation clauses in situations of internal violence.

58. In sum, it is not clear that the derogation argument provides, on its own, a clear justification for developing fundamental standards of humanity. 12/ That is, even though there is no doubt that states of emergency do create serious problems for the protection of human rights, it is not clear that such problems arise primarily from the possibility for States to derogate from certain human rights obligations. It would seem that further analysis would be needed to identify the extent to which the human rights abuses which are most prevalent in situations of internal violence can be attributed to the proper and faithful application of derogation clauses set out in international treaties.

B. Non-State armed groups and human rights law

59. A second problem concerning the adequacy of human rights law arises in regard to the activities of non-State actors. It is clear that measures taken by actors other than States can have a negative impact on the enjoyment of human rights and fundamental freedoms. In particular, armed groups, operating at different levels of sophistication and organization, are often responsible for the most grave human rights abuses. Yet these groups are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States. The supervisory mechanisms established by these treaties are not empowered to monitor or take action on reports on the activities of armed groups.

60. In situations where international humanitarian law applies (discussed below), armed groups are bound by its provisions. However, in situations where that law does not apply the international legal accountability of such groups for human rights abuses is unclear (although clearly such acts should be penalized under domestic criminal law). There are different schools of opinion regarding the proper standard of accountability. Some Governments argue that armed groups can commit human rights violations, and should be held accountable under international human rights law. Other Governments maintain that, while the abuses of armed groups are deserving of condemnation, they are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on Governments. This divergence of views is found also among scholars and commentators.

61. The modern concept of human rights is grounded in an understanding that these rights are held by individuals vis-à-vis the State and create legal obligations on the State of both a negative and positive nature to ensure the full enjoyment of those rights. Human rights protection developed as a means of checking the exercise of State power, and, particularly with regard to economic, social and cultural rights, also as legitimate demands for State intervention to ensure rights were respected (for example, as regards the right to education or the right to health). Later, with the recognition of the right to development, obligations for implementation were placed on States acting alone and in cooperation with each other.

62. And yet, this conception of human rights (while dominant, and rightly so given the scale of violations of human rights by Governments) has never provided a fully adequate description of the scope of international human rights concern. The Universal Declaration of Human Rights, as well as the two International Covenants, in their preambular paragraphs recognize duties on individuals to promote respect for human rights. The two Covenants include this statement in their preambles:

> "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant"

Such references clearly indicate the responsibility of individuals to promote human rights, although it is not clear whether that includes legal obligations

regarding human rights violations. Early efforts to abolish the slave trade, though not explicitly framed in the language of human rights, were directed at suppressing the practice of slavery in all its forms including when the enslavement of others was carried out by non-State actors. The very first United Nations-sponsored human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, clearly applied to "constitutionally responsible rulers, public officials or private individuals" (emphasis added). More recently, resolutions adopted on "Human rights and terrorism" in the Sub-Commission and Commission on Human Rights have expressed concern about the "gross violations of human rights perpetrated by terrorist groups". 13/

63. Also relevant is the fact that certain acts committed by individuals can attract international criminal responsibility regardless of whether the individual acts on behalf of a State or not. These include acts which violate human rights law. The crime of genocide, noted above, is an example, but it is just one of several crimes against humanity which can be committed by non-State agents. Although an exhaustive list of crimes against humanity has yet to be finally agreed, the most recent draft Code of Offences against the Peace and Security of Mankind, prepared by the United Nations International Law Commission, includes numerous human rights abuses in this category. Significantly, the draft Code includes these abuses "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group" (emphasis added). The draft Code includes murder; extermination; torture; enslavement; persecution on political, racial, religious or ethnic grounds; institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; arbitrary deportation or forcible transfer of population; arbitrary imprisonment; forced disappearance of persons; rape, enforced prostitution and other forms of sexual abuse; and other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm. 14/ The discussion on the establishment of an International Criminal Court, due to be finalized at a diplomatic conference of plenipotentiaries in Rome in July 1998, includes the issue of identifying those crimes, including crimes against humanity and war crimes, which will be within the competence of the court. The results of the diplomatic conference will therefore be of particular interest and relevance to this question of determining the accountability of members of armed groups for violations of human rights law.

64. Clearly, given the divergent views on this issue, and its complexity, further study is needed. It seems beyond doubt that when an armed group kills civilians, arbitrarily expels people from their homes, or otherwise engages in acts of terror or indiscriminate violence, it raises an issue of potential international concern. This will be especially true in countries where the Government has lost the ability to apprehend and punish those who commit such acts. But very serious consequences could follow from a rushed effort to address such acts through the vehicle of existing international human rights law, not least that it might serve to legitimize actions taken against members of such groups in a manner that violates human rights. 15/ The development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the

same time ensure that our conception of human rights remains relevant to the world around us.

65. A working paper on terrorism and human rights presented by Ms. Kalliopi K. Koufa to the Sub-Commission at its last session suggested the need to

> "... assess objectively whether (and, eventually, to what extent) international human rights law is moving beyond the traditional dichotomy of individual versus State, beyond the duty of States to respect and ensure the observance of human rights, and towards the creation of obligations applicable also to private individuals and other non-State actors including liberation movements and terrorist organizations." (E/CN.4/Sub.2/1997/28, para. 16).

It might well be that the most appropriate means of identifying the obligations that applied to such groups - as well as to government actors - would be through the development of fundamental standards of humanity.

C. Lack of specificity of existing human rights rules

66. A third possible problem with the application of existing human rights standards to situations of internal violence concerns the lack of specificity of some of the most relevant rights and protections. One of the great advantages of international humanitarian law is that its provisions speak in a direct and detailed manner to the abuses associated with conflict, offering potential victims relatively clear guidance regarding their rights in specific circumstances. Just as importantly, the duties and responsibilities of armed forces are also spelt out in some detail. In contrast, many human rights guarantees which are of critical importance in situations of internal violence are stated in rather general terms. 16/ A couple of examples will illustrate the point.

67. The right to life, and prohibitions on the arbitrary deprivation of life, are found in many human rights instruments. While these instruments give some guidance as regards the application of the death penalty (i.e. when its application amounts to a violation of the right to life), they do not offer any explicit guidance as to when certain means or methods of combat might violate the right to life. In contrast, Additional Protocol I to the Geneva Conventions of 12 August 1949, which is only applicable in international armed conflicts, sets out numerous detailed rules regarding the protection of the civilian population against the effects of hostilities, including outlawing certain means and methods of warfare. Additional Protocol II, which is applicable in certain internal armed conflicts, though less comprehensive still prohibits, for example, direct attacks on the civilian population and the use of starvation of civilians as a method of warfare.

68. Article 12 of the International Covenant on Civil and Political Rights guarantees "the right to liberty of movement and freedom to choose [one's] residence". Article 12 is subject to limitations which are necessary for the protection of, inter alia, national security and public order. In conflicts, people are often forcibly relocated, or restrictions are placed on their

movement, but human rights instruments do not explicitly indicate when such measures might be justified. In contrast, Protocol II specifically provides that people may only be relocated for "imperative military reasons" (article 17 (1)) or for their own safety, and provides guarantees as to the treatment of those moved.

69. In some areas of human rights protection, specific instruments in the form of model rules, codes of conduct and collected principles have been elaborated to give greater meaning and content to certain rights. For example, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) set out detailed rules which are of direct relevance to the protection of the right to life in the context of domestic policing. The point of such principles is not generally to elaborate new rights, but rather to make the protection of existing rights more effective by establishing the obligations the right entails in specific circumstances. A similar code or set of principles which elaborated on protection of the right to life, and other key human rights, in the context of situations of internal violence might be useful.

VI. INTERNATIONAL HUMANITARIAN LAW AND SITUATIONS OF INTERNAL VIOLENCE

70. International humanitarian law covers a wide range of international treaties and agreements, some dating back over a hundred years. The most important instruments are the Four Geneva Conventions for the protection of victims of war of 1949, and their two Additional Protocols. In addition, other important agreements include the Hague Convention No. IV (and Annexed Regulation concerning the Laws and Customs of War on Land) of 1907, the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (and its Regulations), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction of 1972, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 1980 (and its four Protocols), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993 and, most recently, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction of 1997.

71. As indicated above, the argument concerning the problems of applying international humanitarian law to situations of internal violence rests essentially on two points: first, that there are difficulties in determining in which circumstances the treaty rules regulating internal conflicts become operable, and second, that even when these rules do apply they only provide a minimum of protection. In addition, neither argument can be properly examined without also considering the scope of customary law.

72. Before examining these issues, however, one important caveat should be made. Whatever problems there might be with the scope of the existing rules,

it is always important to ask ourselves whether the continuing abuses result from legal ambiguities or rather reflect other realities. That is, it would be unwise and unhelpful to focus too heavily on examining the inadequacies of the existing law if that leads to the assumption that addressing these inadequacies will in itself be sufficient. The following discussion should be read with this in mind, and it is a point returned to in the concluding paragraphs of this report.

A. Scope of application of international humanitarian law to situations of internal violence and conflict

73. When the 1949 Geneva Conventions were drafted and adopted, it was possible to spell out in considerable detail rules regarding the care of the wounded, sick and shipwrecked, the treatment of prisoners of war, and even the protection of civilians in occupied territories. But these detailed rules were only applicable in wars between States. As regards "non-international armed conflicts", only one article could be agreed. Common article 3 (so-called because it is found in all four Conventions) provides that:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> "To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> "(b) taking of hostages;
>
> "(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> "(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> "(2) The wounded and the sick shall be collected and cared for."

74. The importance of common article 3 should not be underestimated. It sets out in straightforward terms a number of important protections that all

parties to a conflict must respect, and applies to any armed conflict "not of an international character". It is now considered to be part of customary international law. However, common article 3 has two shortcomings. First, it provides only a minimum of protection; for example, it is silent on issues relating to freedom of movement, does not explicitly prohibit rape, and does not explicitly address matters relating to the methods and means of warfare. Second, while common article 3 does not define "armed conflicts not of an international character", in practice this wording has left room for Governments to contest its applicability to situations of internal violence inside their countries.

75. However, efforts to improve upon the shortcomings of common article 3 have met with only limited success. The most significant of these efforts grew out of a resolution adopted at the International Conference on Human Rights, held in Tehran in 1968. Resolution XXIII specifically requested the General Assembly to invite the Secretary-General to study, inter alia:

> "The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts ...". (emphasis added) 17/

This request was based on the consideration that the 1949 Geneva Conventions were "not sufficiently broad in scope to cover all armed conflicts". The studies subsequently prepared by the Secretary-General, in close consultation with the ICRC, recommended that, among other things, efforts be undertaken to considerably expand the scope of protection in internal armed conflicts. The proposals subsequently developed by the ICRC reflected the same concern, and the draft protocol on internal conflicts that the ICRC presented to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1974-1977) set out many detailed rules. However, many of these rules were not accepted and the Diplomatic Conference adopted, on 8 June 1977, a significantly watered-down text in the form of Protocol II (relating to the Protection of Victims of Non-International Armed Conflicts).

76. Protocol II sets out numerous important guarantees for the protection of those affected by non-international armed conflicts. It expands the protection offered by common article 3 to include prohibitions on collective punishments, violence to health and physical or mental well-being, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. In addition, it includes provisions for the protection of children, for the protection and rights of those detained for reasons related to the conflict, and provides fair trial guarantees for those prosecuted for criminal offences related to the conflict. There are also articles dealing with the protection and care of the wounded, sick and shipwrecked and the protection of medical and religious personnel. Protocol II also prohibits attacks on the civilian population, the use of starvation as a method of war, and the arbitrary displacement of the civilian population.

77. The protections offered by Protocol II are a considerable improvement on common article 3. However, measured against the rules for inter-State wars, they are still quite basic. The most serious omissions concern the many

specific protections for civilians against the effects of hostilities found in Protocol I. For example, Protocol I prohibits direct and indiscriminate attacks on civilians, including providing examples of specific types of prohibited indiscriminate attacks; it places fairly detailed obligations on armed forces regarding precautions to be taken to ensure the protection of the civilian population and civilian objects; and it establishes rules regarding non-defended localities and demilitarized zones. Protocol II provides only a few general rules on these matters.

78. However, the bigger difficulty with Protocol II is that the protections it offers only apply in internal conflicts meeting a certain threshold of intensity and nature. Under article 1 (1), the Protocol applies to armed conflicts:

> "... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

And article 1 (2) specifically excludes from the scope of the Protocol:

> "... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

79. This two-fold test would appear to limit the application of Protocol II to situations at or near the level of a full-scale civil war, and certainly few Governments are prepared to admit the application of the Protocol to situations of lesser intensity. Since neither the Protocol nor any other agreement allows for an impartial outside body to decide on whether the criteria are met to apply the Protocol, it is largely left to the goodwill of the Government concerned. This goodwill is often lacking - admitting the application of the Protocol is seen as conferring international legitimacy on the opposition forces (even though such an interpretation is specifically ruled out by another provision of the Protocol), and/or an implicit admission on the Government's part of its lack of effective control in the country.

80. The result is that there are many situations of internal violence - including ones leading to thousands of deaths - where there are no clear treaty rules in place to regulate important aspects of the behaviour of the armed forces and armed groups involved. It is revealing to note that there are occasions where the Security Council has determined that an internal situation amounts to a threat to international peace and security (so as to initiate action under the Charter), but where it is unclear as to whether Protocol II would apply. 18/

81. Clearly, from the point of view of the actual or potential victims, this is an unsatisfactory state of affairs. Civilians and civilian objects should be clearly protected against direct and indiscriminate attack in all circumstances. Weapons or methods of warfare the use of which is prohibited in international armed conflicts should also generally be prohibited in situations of internal violence and conflict. Likewise, obligations on armed

forces to take precautions in attack so as to reduce the risk of civilian casualties, and detailed rules regarding facilitating and protecting the work of humanitarian agencies providing relief to the civilian population should apply regardless of the nature or scale of the conflict. It seems illogical, and indeed morally indefensible, to suggest that armed forces are free to engage in behaviour against citizens of their own country which would be outlawed were they involved in military operations abroad. Likewise, why should armed groups be held internationally accountable for arbitrarily expelling people from their homes, for example, only when the conflict they are engaged in meets the high threshold established in Protocol II?

82. The problems of international humanitarian law regarding situations of internal violence are widely acknowledged. But efforts to redress this are often viewed with scepticism given the failure of the 1974-1977 Diplomatic Conference to adopt a strong and detailed protocol regulating as broad a category as possible of internal armed conflicts. This failure has been largely attributed to the fear by many Governments that setting out rules for internal conflict would give some legitimacy to the armed group or groups with which they were in conflict, or that it might provide an excuse for intervention by other States or inter-State organizations in the conflict. Specific provisions in Protocol II ruling out such interpretations were apparently insufficient to alleviate these fears.

83. The key question therefore is whether it is feasible to further develop the rules regulating internal violence in such a way as to ensure protection to all who need it whenever they need it. Given past difficulties, it would seem unrealistic to assume that the problems can be overcome by redrafting or updating existing treaties. Moreover, in this regard it is important to point out the importance of customary rules of international humanitarian law - rules separate from treaty law and which are of cardinal importance when it comes to overcoming the problems of applying international humanitarian law in situations of internal violence. As discussed in the next section, there are a number of developments regarding the identification of customary rules which could assist in identifying fundamental standards of humanity.

B. Customary international humanitarian law

84. The above analysis has been restricted to existing rules found in international treaties. It needs to be stressed that separate from treaty rules, internal armed conflicts are still regulated by the rules of customary international law. As far back as 1907, States have seen fit when drafting international agreements concerning the law of war to explicitly indicate that in situations not covered by treaty rules, both combatants and civilians:

> "... remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." 19/

This clause, known as the Martens clause, is found also in the Preamble to Protocol II:

"Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

85. Like common article 3, the importance of the Martens clause should not be underestimated. It shows a concrete recognition and acceptance by States that rules of customary international law above and beyond existing treaty rules can apply to fighting inside countries. 20/ To date, the problem has been in determining, both in general and as regards any specific case, what is prohibited by the "principles of humanity and the dictates of the public conscience". Does this mean, for example, that weapons the use of which is prohibited in international conflicts cannot generally be used in internal conflicts? Does it mean that prohibitions on arbitrary displacement and on the use of starvation as a method of war apply at all times, and not just in internal conflicts meeting the high threshold of Protocol II? Or does it also mean that indiscriminate attacks are prohibited at all times and not just in international conflicts?

86. There are a number of recent and ongoing developments, however, which indicate that perhaps some of these questions are now being answered, and that more specific content is being given to the general notion of customary norms. In particular, both of the International Criminal Tribunals established by the Security Council to try those indicted for war crimes and crimes against humanity in the former Yugoslavia and Rwanda are likely to provide rulings that develop in greater detail rules applying in internal conflicts which form part of customary law. 21/ Indeed, the statutes of these two Tribunals, particularly as regards Rwanda, have already shown developments in the law applicable to internal conflicts. Similarly, the process of drafting a statute for a proposed International Criminal Court, due to be finalized in Rome in 1998, is also likely to result in relevant developments.

87. Also, the ICRC is currently engaged in a wide-ranging and comprehensive study of the rules of customary international law applying in both international and non-international armed conflicts. This study developed out of recommendations made by the intergovernmental group of experts, which was mandated by the International Conference for the Protection of War Victims (held in Geneva in September 1993) to study practical means for ensuring compliance with international humanitarian law. The recommendations were endorsed by the Twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995. The results of that study will also be interesting as regards the development of rules applying in internal conflicts.

88. Clearly, it will be important to follow these developments closely, and to assess their impact as regards clarifying the protections and rights of those affected by situations of internal violence and conflict. It might well be that the identification of customary rules obviates some of the problems which exist in the scope of the existing treaty law, and will assist in the identification of fundamental standards of humanity. The Commission might consider it useful if further reports could provide information and analysis regarding these developments.

VII. ADVANTAGES AND DISADVANTAGES OF IDENTIFYING FUNDAMENTAL STANDARDS OF HUMANITY

89. The question of weighing the desirability of a statement of fundamental standards of humanity turns on a full analysis of whether existing standards are sufficient. As set out above, there are some problems with the scope and application of existing law, but more analysis is needed to identify precisely where further elaboration and clarification are needed, and to see how developments elsewhere assist in that regard.

90. Separate from the legal point, however, a key issue is the more practical point as to the impact a statement of fundamental standards of humanity would have on actually reducing or preventing abuses. In other words, such a statement should not be viewed as an end in itself.

91. Insofar as there is confusion about the application of existing rules, a statement of fundamental standards of humanity would provide a useful reference for those advocating greater respect for human rights in situations of internal violence. This applies especially to those engaged in education and training programmes with members of armed forces. It is also likely that a statement of fundamental standards of humanity would be useful to the work of humanitarian workers involved in situations of internal violence.

92. As regards education or training programmes, the view has been expressed that a statement of fundamental standards of humanity would be an extremely useful document for explaining the basic principles of protecting human rights in situations of internal violence. The idea is that if this statement set out principles in a simple and straightforward manner, it would facilitate the process of making these principles known, rather than trying to explain all the complexities of existing law. This point might be of particular relevance as regards seeking to influence the behaviour of armed groups.

93. However, to ensure the rules are not only known but also respected is the key challenge. It seems likely that a statement of principles would depend on existing bodies for its implementation, for example, country and thematic rapporteurs and working groups of the Commission on Human Rights. It would be important to have some input from these and other bodies as to the possible usefulness of a statement of fundamental standards of humanity to their work.

94. The potential disadvantages of identifying fundamental standards of humanity centre on the fear that a statement of such standards might undermine existing international standards. This fear is based on a number of factors. In particular, because the original proposal involved identifying a set of <u>minimum</u> standards there was the possibility that, by implication, rights not included would be somehow diminished. Also, there is always the risk that when any new text is agreed upon it might fall below or somehow undermine existing rules. On the other hand, it is possible to guard against such results or interpretations through including specific clauses in the new text, as has been done in numerous human rights instruments. Also, there are other examples where the development of codes of conduct or statements of principles have been agreed to which do not undermine, but rather support, treaty rules.

If work does proceed on identifying fundamental standards of humanity, there will be a need to ensure it does not pose a risk to existing treaty law.

95. Another potential disadvantage is the risk that the development of fundamental standards of humanity becomes bogged down in political disputes, or that the standards themselves are seen as a potential political tool to be used selectively and/or in a manner inconsitent with the Charter of the United Nations. Of course, in this field such risks are always present. It will be important to ensure to the greatest extent feasible that the focus is on the victims, and that humanitarian - not political - imperatives are the motor which drives the process forward. Moreover, if work does proceed it must not be a substitute for efforts directed at implementation of the existing law.

VIII. WHAT ARE THE FUNDAMENTAL STANDARDS OF HUMANITY?

96. As indicated above, in resolution 1997/21 the Commission requested the Secretary-General to, inter alia, identify "common rules of human rights law and international humanitarian law that are applicable in all circumstances", with the inference being that such rules would form the basis of a list of fundamental standards of humanity. But this is not as straightforward at it might at first appear. Such rules are to be found not only in treaties and declarations but also in customary international law, and determining the content of the latter is a difficult task that needs to be undertaken with diligence and care. It requires, for example, a comprehensive survey of the practice of both national and international courts and other authoritative bodies, as well as the actual practice of States worldwide.

97. However, to recognize the complexity of the task is not to cast doubt on its usefulness. Certainly, developing a compilation of existing norms, whether treaty based or customary, that apply in situations of internal violence would be a worthwhile undertaking. It would be the best means of reaching definitive conclusions on the adequacy of the existing standards. But, as indicated by the discussion above, given relevant ongoing developments in both human rights law (as regards the elaboration of crimes against humanity) and international humanitarian law (as regards the identification of customary rules and the international criminalization of some acts), it would seem that coming up with a conclusive and authoritative list at the present time would be premature. Still, a number of points can be made.

98. First, it is clear that to effectively address human rights abuses in situations of internal violence, at a minimum standard dealing with the abuses set out in section II.B would need to be included, namely: deprivation of the right to life; torture and cruel, inhuman or degrading treatment; freedom of movement; the rights of the child; women's human rights; arbitrary deprivation of liberty and due process; and protection of the civilian population. Also, the standards would need to be stated in a way that was specific enough to be meaningful in actual situations, and yet at the same time be clear and understandable.

99. Second, the need to find rules common to both branches of relevant law points to one of the most interesting aspects of the whole problem - namely, the need, where appropriate, to consider a fusion of the rules. For too long,

these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness - particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of the nature of a civil war. But in situations of internal violence - where there is considerable overlap and complementarity - this distinctness can be counter-productive. One must be careful not to muddle existing mandates, or to undermine existing rules, but within these constraints there is still considerable scope for building a common framework of protection.

IX. NATURE OF A STATEMENT OF FUNDAMENTAL STANDARDS OF HUMANITY

100. This report has left open the question of the form an eventual statement of fundamental standards of humanity might take. The Sub-Commission resolution in 1994 which forwarded the Turku/Åbo Declaration on Minimum Humanitarian Standards to the Commission on Human Rights recommended its "... further elaboration and eventual adoption". To date, the resolutions adopted by the Commission have only recognized "the desirability of identifying principles", without indicating in what manner such principles might be agreed upon and adopted.

101. Previous sets of principles and standards in the human rights field have normally been developed in working groups established by the Commission on Human Rights, and then forwarded to the General Assembly for adoption through a General Assembly resolution. However, there might be other options for developing a statement of fundamental standards of humanity. Given the close relationship with issues of international humanitarian law and the ICRC's acknowledged expertise in this field, there is no doubt that the ICRC should be closely involved in any efforts to develop these standards.

102. It would seem premature at this point to consider this issue further. Decisions on the nature of the statement inevitably must be preceded by discussions and agreement on the precise need for a statement of fundamental standards of humanity, and the types of standards it would include. Only then would it be clearer as to the form such a statement would take, for example whether it should simply be in the nature of a declaration of principles.

X. CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

103. The aim of this report has been to set out the various issues involved in the possible identification of fundamental standards of humanity. Where possible, tentative conclusions on certain points have been put forward; elsewhere, issues have been identified as deserving of further consultation and analysis.

104. Of necessity, an analysis of whether an elaboration of standards is required must consider the legal questions involved. To the non-lawyer this exercise might seem a bit abstract. In concluding, therefore, it is appropriate first to reiterate and emphasize the starting point for the discussion, namely the horrific impact on the lives of millions of individuals of the many situations of internal violence which continue to plague our world. Most of the country-specific resolutions adopted by the Commission on

Human Rights concern countries in which there is some degree of internal violence, and such countries figure prominently also in the reports of the Commission's various thematic rapporteurs and working groups. There is clearly a close relationship between the existence of these conflicts and human rights abuse. It is therefore timely and appropriate to look again at the tools we have at hand to prevent these abuses.

105. One of these tools is international law, and as regards internal violence we have legal standards from both human rights and humanitarian law. The picture that emerges from this intial report is that there are some problems with both branches of law. The extent to which international human rights law creates obligations on non-State armed groups is unclear, and it can be argued that some of the most important rights - for example, the right to life - as set out in international instruments lack the specificity to give them real impact in internal conflicts. On the other hand, international humanitarian law can be applied to non-State armed groups, and its rules are specific and detailed, but its application in many internal situations is hampered by troublesome threshold tests and the absence - in the treaty law - of some important protections.

106. Insofar as the development of fundamental standards of humanity can overcome these problems, it is an initiative that deserves serious attention and support. Clearly, however, the initiative needs to proceed with close attention to ongoing developments in both branches of law. Further study and activity might, among other issues, focus on the following:

(a) Examining the international legal accountability of non-State armed groups for abuses, including views as to whether a statement of fundamental standards of humanity would be an appropriate means of holding these groups accountable;

(b) Examining how relevant provisions of human rights law could be made more specific so as to ensure respect for them in situations of internal violence, and considering whether this could be accomplished through a statement of fundamental standards of humanity;

(c) Following closely developments regarding the identification of crimes against humanity and customary rules of international humanitarian law relevant to the protection of human dignity in situations of internal violence, and assessing how these developments relate to the identification of fundamental standards of humanity;

(d) Soliciting views from Governments and other relevant actors concerning the issues set out in this report, and engaging in consultations for this purpose.

107. Beyond the question of legal standards, there are other tools at hand to ensure respect for human rights in situations of internal violence and conflict. As indicated above in section III, it might be useful to draw on existing sources of information to develop a more comprehensive picture of the most serious and frequent human rights abuses in such situations, including the context in which they occur. Such an exercise could also consider and, eventually, make recommendations concerning means of ensuring better respect

for human rights in situations of internal violence. For example, it could address the question of whether knowledge of the existing law is adequate, and to what extent additional training activities might assist in ensuring respect for the law.

Notes

1/ The use of the terms "armed group" or "non-State armed group" is also without prejudice as to whether the activities of the groups are covered by international humanitarian law.

2/ The full text of the Declaration can be found in the annex to document E/CN.4/1996/80. The idea for such a declaration was first developed in the early 1980s; see Theodor Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", 77 American Journal of International Law 589 (1983). See also Asbjørn Eide, Theodor Meron and Alan Rosas, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards", 89 American Journal of International Law 215 (1995) for a summary of the Declaration and its consideration by international bodies.

3/ See especially the report of the expert appointed by the Secretary-General pursuant to General Assembly resolution 48/157, Ms. Graça Machel, on the impact of armed conflict on children (A/51/306) and the Supplement to An Agenda for Peace, position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1), at paras. 8-15. Also useful in this regard are the reports submitted to the Commission on Human Right since 1993 by the Secretary-General's Special Representative on internally displaced persons, Mr. Francis Deng.

4/ See "Mapping Violent Conflicts and Human Rights Violations in the mid-1990s", A.J. Jongman and A.P. Schmid, World Conflict Map, prepared by PIOOM (Interdisciplinary Research Program on Causes of Human Rights Violations), Leiden University, Netherlands. The Machel study, cited above, gives a figure of "30 major armed conflicts" taking place within States.

5/ The use of the term "political objectives" is not intended to confer any legitimacy on such objectives, but is rather used as a means of distinguishing these groups from other groups which might also be armed, for example those solely engaged in organized crime.

6/ See Robin M. Coupland, "The Effect of Weapons: Defining Superfluous Injury and Unnecessary Suffering", in Medicine and Global Survival, Volume 3, March 1996.

7/ Further information on the impact of conflict on women's human rights can be found in the latest report to the Commission on Human Rights of the Special Rapporteur on violence against women, Ms. Radhika Coomaraswamy (E/CN.4/1998/54 and Add.1).

8/ As of 15 December 1997, there were 137 States parties to the International Covenant on Economic, Social and Cultural Rights and 140 States parties to the International Covenant on Civil and Political Rights.

9/ The European Convention limits non-derogability to the right to life, the prohibition of torture and slavery and the non-retroactive nature of criminal law. The American Convention includes all of the non-derogable rights of the ICCPR (except prohibition of imprisonment for failure to perform

a contractual obligation), and adds several others including protection of the family, rights of the child, and political and nationality rights.

10/ The Special Rapporteur of the Sub-Commission on states of emergency has suggested that national legislation should allow for the declaration of a state of emergency only:

"(i) In the event of severe disturbances that endanger the vital interests of the population and constitute a threat to the organized life of the community, in the face of which the restrictive measures permitted by the Constitution and laws in ordinary circumstances are clearly inadequate; or

(ii) In the event of a real or imminent danger of such disturbances; [and]

(iii) Solely in order to safeguard the rights and safety of the population and the operation of public institutions under the rule of law" (E/CN.4/Sub.2/1997/19, para. 82).

11/ See Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted by the 61st Conference of the International Law Association in August 1984, 79 American Journal of International Law 1985, at 1072; and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted in 1984 at a meeting of experts in international law, 7 (1) Human Rights Quarterly 1985, at 3.

12/ On the other hand, the Special Rapporteur on states of emergency, Mr. Leandro Despouy, in his final report to the Sub-Commission (E/CN.4/Sub.2/1997/19/Add.1) included among his many interesting recommendations his endorsement of the proposal to adopt a declaration of minimum humanitarian standards.

13/ See, for example, Commission resolution 1997/42 of 11 April 1997 and Sub-Commission resolution 1997/39 of 28 August 1997.

14/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), chap. 11.D, Part I, art. 18.

15/ "It was stated that most mechanisms dealing with human rights violations had adhered so far to the system of State responsibility for human rights violations. Giving terrorist groups the quality of violators of human rights would be dangerous and could amount to a sort of justification of human rights violations committed by Governments. A distinction should be made between citing such groups as human rights violators and the adverse effects their action might have on the enjoyment of human rights." Report of the meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, Geneva, 28-30 May 1996 (E/CN.4/1997/3, annex, para. 44).

16/ A similar argument has been made regarding the development of guidelines for the protection of internally displaced persons. "The second area of insufficient coverage results where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons. In such cases, it is possible to infer specific legal rights from existing general norms; however, the protection of internally

displaced persons would be strengthened by spelling out these specific guarantees in an international instrument" (E/CN.4/1996/52/Add.2, para. 411).

17/ Final Act of the International Conference on Human Rights, Tehran, 22 April-13 May 1968. United Nations publication (Sales No. E.68.XIV.2), chap. III.

18/ For example, see resolutions 794 (1992) of 3 December 1992, 814 (1993) of 26 March 1993 and 837 (1993) of 6 June 1993 on Somalia; and resolution 813 (1993) of 26 March 1993 on Liberia.

19/ Preamble, The Hague Convention No. IV of 18 October 1907 concerning the Laws and Customs of War on Land. The modern formulation of this clause in Protocol I reads as follows: "In cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience." Article 1 (2) Protocol I.

20/ It should also be pointed out that the references to the "public conscience" and "principles of humanity" appear to envisage going beyond customary rules based on State practice.

21/ See, for example, the Tadić decision of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia since 1991, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995).